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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN DAVID CERVANTES,

Defendant and Appellant.

2d Crim. No. B289082
(Super. Ct. No. 2017005367)
(Ventura County)

Juan David Cervantes appeals from his conviction after a bench trial of battery causing serious bodily injury (Pen. Code, § 243, subd. (d))¹ and assault with force likely to produce great bodily injury (§ 245, subd. (a)(4)). The trial court found true an allegation that Cervantes personally inflicted great bodily injury when he committed the assault. (§ 12022.7, subd. (a).) It also found that he suffered a prior strike. (§§ 667, subds. (c)(1) & (e)(1); 1170.12, subds. (a)(1) & (c)(1).) The court sentenced him to seven years in state prison.

¹ All statutory references are to the Penal Code.

We conclude there was sufficient evidence that Cervantes's victim lost consciousness to support a finding of great bodily injury. But the record does not demonstrate that Cervantes waived jury with full awareness of the nature of the right being abandoned, because the trial court did not explain any of the significant features of jury trials, such as jury selection or unanimity. (*People v. Sivongxxay* (2017) 3 Cal.5th 151, 166 (*Sivongxxay*)). We reverse.

BACKGROUND

Cervantes and a companion attacked a juvenile victim, Richard M., while Richard M. was walking with his girlfriend. Cervantes hit and kicked Richard M. The details are not material to the issues on appeal, except that three witnesses described Richard M.'s loss of consciousness.

Loss of Consciousness

Lanette Dahl lived nearby, heard a commotion, and went outside. She said Richard M. was "clearly passed out" and was not moving. His eyes were "rolling back and forth." He "tried to sit up, um, because they did shake him a bit," but his head would barely raise and then "go back down."

Lidia Yates drove by. She saw Richard M. get up but then fall straight backwards with his arms up, "[l]ike he passed out or something."

Richard M.'s girlfriend said he "wasn't here." She shook him and he did not respond. His eyes were closed. At the hospital, she saw him move again.

The trial court found that Richard M. suffered great bodily injury because he was "rendered unconscious." It observed that Dahl's and Yates's testimony was "credible," "independent," and "very convincing."

Jury Waiver

When the trial court accepted Cervantes's jury waiver, the following exchange occurred:

"THE COURT: . . . So we have discussed in chambers the case. My understanding is that because the pivotal issue here is something that the Court is going to have to rule on in any event, that the defendant chooses to waive jury, that the People join in the waiver, and that there would be a time waiver so that the matter could start tomorrow morning. Is that still your desire, [Defense Counsel]?"

"DEFENSE COUNSEL: That's correct, Your Honor. My client is prepared to personally waive jury, which is what is required.

"THE COURT: Okay. Very good. Let me make that inquiry, if I could. Now, Mr. Cervantes --

"THE DEFENDANT: Yes, sir.

"THE COURT: [Y]ou do have a right to have this matter tried to a jury. If you did, you couldn't be compelled to testify, and your attorney, who's very experienced in these matters, could cross-examine witnesses, call witnesses on your behalf. And the People would have the burden of proof. But what is being suggested to me is that the jury be waived and that the matter be tried to the court, in which case I would decide the result. Is that okay with you, sir?"

"THE DEFENDANT: Yes, Your Honor.

"THE COURT: Okay. You've had a chance to talk to [Defense Counsel] about that, right?"

"THE DEFENDANT: Yes, I have.

“DEFENSE COUNSEL: And all the things that you advised him of, about not having to testify and so forth, are the same whether it’s tried to you or tried to the jury.

“THE COURT: Well, and that is absolutely true. Thank you, [Defense Counsel]. I appreciate that. Okay.”

DISCUSSION

Evidence of Great Bodily Injury

Cervantes contends there was not sufficient evidence of a significant injury to sustain the finding that Richard M. suffered great bodily injury. We disagree. Three witnesses testified competently to Richard M.’s loss of consciousness based on their personal observations, and the trial court credited their testimony.

Whether an injury constitutes great bodily injury is a question of fact. (*People v. Wolcott* (1983) 34 Cal.3d 92, 107.) We will not disturb the trier of fact’s determination if it is supported by substantial evidence. (*Ibid.*) We view the record in the light most favorable to the judgment. (*People v. Pennington* (2017) 3 Cal.5th 786, 800.) Loss of consciousness is a condition that qualifies as serious bodily injury. (§ 243, subd. (f)(4).) Evidence of medical treatment is not necessary to prove great bodily injury. (*People v. Wade* (2012) 204 Cal.App.4th 1142, 1150.)

Cervantes argues that no witness gave competent testimony regarding Richard M.’s physical state because neither Richard M. nor any medical expert testified that Richard M. lost consciousness. Cervantes acknowledges that two independent witnesses described Richard M.’s loss of consciousness, but contends their testimony conflicts. Dahl said Richard M. tried to sit up after he passed out but his head fell back down and his

eyes rolled back; whereas Richard M.'s girlfriend said she did not see Richard M. move again until he was at the hospital.

The trial court weighed and considered all the evidence. It said, "There is conflicting evidence as to whether [Cervantes] was unconscious for the entire several-minute duration of – before he was able to sit up again or whether he was lapsing in and out of consciousness, but I think that, clearly, the cumulative evidence here, based on independent witnesses who had an excellent vantage point and ability to make that assessment, persuades the Court that the victim was rendered unconscious."

We will not reweigh the evidence, reassess the credibility of witnesses, or resolve conflicting evidence. (*People v. Xiong* (2013) 215 Cal.App.4th 1259, 1268.) Substantial evidence supports the trial court's finding.

Waiver of Right to Jury Trial

Cervantes contends he did not knowingly and intelligently waive his right to a jury trial because the trial court did not tell him that a jury is comprised of 12 members, that it must reach a unanimous decision, or that he would be able to participate in their selection. He points out that he was 19 years old at the time, and this was his first felony charge as an adult.

The U.S. and California Constitutions guarantee the right to trial by jury. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 16.) Denial of that right is structural error. (*People v. Jones* (2018) 26 Cal.App.5th 420, 429.) A valid waiver must be knowing, intelligent, and voluntary. That is, it must be made with full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it; and the waiver must be the product of a free and deliberate choice rather than

intimidation, coercion, or deception. (*Sivongxxay, supra*, 3 Cal.5th 151, 166.)

The validity of the waiver must be shown affirmatively on the record under the totality of the circumstances of the particular case. (*People v. Collins* (2001) 26 Cal.4th 297, 310.) “The burden is on the party claiming the existence of the waiver to prove it by evidence that does not leave the matter to speculation, and doubtful cases will be resolved against a waiver.” (*People v. Smith* (2003) 110 Cal.App.4th 492, 500-501.)

It is the trial court’s responsibility to advise the defendant of his or her right to a jury trial and to determine impartially whether the waiver is knowing, intelligent, and voluntary. (*People v. Daniels* (2017) 3 Cal.5th 961, 992-993.) No particular form of admonishment is required; the validity of the waiver is determined by the totality of the circumstances of the particular case. (*Sivongxxay, supra*, 3 Cal.5th 151, 167.) But the California Supreme Court provided specific guidance almost two years ago:

“Going forward, we recommend that trial courts advise a defendant of the basic mechanics of a jury trial in a waiver colloquy, including but not necessarily limited to the facts that (1) a jury is made up of 12 members of the community; (2) a defendant through his or her counsel may participate in jury selection; (3) all 12 jurors must unanimously agree in order to render a verdict; and (4) if a defendant waives the right to a jury trial, a judge alone will decide his or her guilt or innocence.” (*Sivongxxay, supra*, 3 Cal.5th 151, 169.) In *People v. Jones, supra*, 26 Cal.App.5th 420, 428, judgment was reversed where none of these facts were explained to the defendant on the record. Here, only the fourth fact was explained to Cervantes.

In *Sivongxxay*, the court wrote, “We also recommend that the trial judge take additional steps as appropriate to ensure, on the record, that the defendant comprehends what the jury trial right entails. A trial judge may do so in any number of ways—among them, by asking whether the defendant had an adequate opportunity to discuss the decision with his or her attorney, by asking whether counsel explained to the defendant the fundamental differences between a jury trial and a bench trial, or by asking the defendant directly if he or she understands or has any questions about the right being waived. Ultimately, a court must consider the defendant’s individual circumstances and exercise judgment in deciding how best to ensure that a particular defendant who purports to waive a jury trial does so knowingly and intelligently.” (*Sivongxxay, supra*, 3 Cal.5th 151, 169-170.)

The trial court did not explain any of the fundamental differences between a jury trial and a bench trial to Cervantes. It explained general aspects of any trial, whether by jury or court, but nothing unique to jury trials. It asked Cervantes if he had a “chance to talk about that” with his attorney, but did not refer to any fundamental differences and nothing in the record suggests they were discussed. Without that, the court’s explanation that it would try the case if Cervantes waived a jury trial conveyed little about the fundamental right being waived.

It is true that advice about a particular feature of jury trials is not essential if the totality of the circumstances demonstrates that the defendant was aware of the right being abandoned. (*Sivongxxay, supra*, 3 Cal.5th 151, 167.) The California Supreme Court “ha[s] never insisted that a jury waiver colloquy invariably must discuss juror impartiality, the

unanimity requirement, or both for an ensuing waiver to be knowing and intelligent.” (*Id.* at p. 168.) But the totality of the circumstances here does not demonstrate that Cervantes was aware of the right being abandoned.

In *Sivongxxay*, the trial court did not advise the defendant about jury impartiality or unanimity. But in those circumstances the waiver was knowing and intelligent because the court explained that the jury consists of 12 people from the community and that the defendant could participate in jury selection. In connection with a prior plea, the defendant signed a waiver stating he fully understood the right to a jury trial. (*Sivongxxay*, *supra*, 3 Cal.5th 151, 167.) This record does not include similar explanations or experience.

In *People v. Wrest* (1992) 3 Cal.4th 1088, 1105, the defendant answered “no” when asked if he felt he knew “all the ins and outs” of a jury trial, but his waiver was knowing and intelligent in all the circumstances. The prosecutor explained on the record that a jury consists of 12 citizens whose decision must be unanimous, and that the defendant’s lawyer would participate in selection. (*Id.* at pp. 1103-1104.) “There is no constitutional requirement that [a defendant] understand ‘all the ins and outs’ of a jury trial in order to waive his right to one.” (*Id.* at p. 1105.) But the record contains no explanation of any unique aspects of a jury trial.

In *People v. Doyle* (2016) 19 Cal.App.5th 946, 953-954, a waiver was held to be valid in circumstances similar to Cervantes’s, but we do not reach the same result. In *Doyle*, as in this case, the trial court did not explain unanimity or selection. It advised the defendant that he had a right to a jury trial; it explained rights he would have at a jury or court trial; and his

attorney told the court she discussed the right to a jury trial with him. (*Id.* at p. 951.) Like this record, there was no mention of the differences between jury and bench trials. Nevertheless, the Court of Appeal concluded the waiver was valid because “defendant’s counsel advised the trial court she had discussed defendant’s waiver of a jury trial with him on two occasions,” and “[t]here [was] nothing in the record to support that defendant was confused as to the right to a jury trial or that he did not knowingly waive that right.” (*Id.* at p. 953.) We disagree with that approach. We uphold the waiver of a jury trial “only when the record affirmatively demonstrates it was knowing and intelligent.” (*People v. Daniels, supra*, 3 Cal.5th 961, 991.) Silence does not support the conclusion that Cervantes’s waiver was knowing and intelligent.

DISPOSITION

The judgment is reversed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

David Worley, Judge

Superior Court County of Ventura

Laurie A. Thrower, under appointment by the Court of Appeal, for Defendant and Appellant.

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